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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MICHAEL M., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL M.,

Defendant and Appellant.

D037445

(Super. Ct. No. J187727)

APPEAL from an order of the Superior Court of San Diego County, William H.
McAdam, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Michael M. appeals from an order of wardship (Welf. & Inst. Code, § 602) after the juvenile court found he committed a residential burglary (Pen. Code,¹ § 459). The court committed Michael to the Youth Correctional Center for a period not to exceed 270 days. Michael contends there was insufficient evidence of an entry to support the burglary true finding. We affirm.

FACTS

Shortly before 11:00 p.m. on December 30, 2000, Brooke Dougherty heard loud noises coming from the back of her house on Elm Avenue in Chula Vista. She immediately telephoned 911 and told the dispatcher she believed someone was breaking into her house. Dougherty, who remained on the telephone with the dispatcher, heard more noises on the side of the house as she awaited the arrival of the police. She heard "some wrestling at the window as if somebody were trying to get into the window" in her bedroom. As she was reporting this to the dispatcher, she heard a police officer yell at someone to put his hands up. The police apprehended Michael outside the house.

Dougherty did not know Michael and he did not have permission to enter her residence.

Dougherty and the police inspected the outside of the residence. Three windows -- two windows in the spare bedroom and the window in her dining room -- had been opened several inches. These windows had stoppers that prevented them from being opened all the way. The screens to these windows had been removed and they were bent

¹ All further statutory references are to the Penal Code unless otherwise specified.

and damaged. Dougherty said the screens had been nailed to the house to secure them. The investigating police officer said he had noticed that one of the windows had a nail that was pulled off to the side.

The shade to the dining room window had been pushed back against the curtain valence, which was also pushed back. When Dougherty had checked that window earlier that evening the curtain and shade had not been disturbed.

It was stipulated that Michael's fingerprints were found on the outside of one of the windows but none of his fingerprints was found on the inside of the windows.

Michael testified he was walking home from a friend's house when he was confronted by gang members. Fearing he would be attacked, Michael fled, jumping fences and running through yards. He approached Dougherty's house to seek help because there was a light on.

Michael admitted he removed the screens and opened the windows, but denied putting his hands inside the windows. He explained he placed his hands flat against the outside of the glass and pushed upwards to open them. Michael also denied touching the shade or curtains.

DISCUSSION

Michael contends there was insufficient evidence of an entry to support the true finding on the burglary allegation. The contention is without merit.

Section 459 defines burglary as follows: "Every person who enters any house, room, apartment, . . . or other building . . . with intent to commit grand or petit larceny or

any felony is guilty of burglary." At issue here is whether there was substantial evidence that Michael entered the residence.

The test for review on appeal of the sufficiency of the evidence is the same for juvenile criminal proceedings as it is for adult criminal proceedings. (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.) It is the function of the reviewing court "to determine whether the record contains any substantial evidence tending to support the finding of the trier of fact, and in considering this question we must view this evidence in the light most favorable to the finding." (*Id.* at p. 808.)

Substantial evidence is evidence " 'of ponderable legal significance . . . reasonable in nature, credible, and of solid value.' [Citations.]" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) It makes no difference for purposes of review whether the evidence is direct or circumstantial. (*People v. Towler* (1982) 31 Cal.3d 105, 118.)

Where, as here, there is conflicting evidence, the question before us is whether any rational trier of fact could have concluded beyond a reasonable doubt that Michael committed the offense, not whether we are convinced beyond a reasonable doubt. (*People v. Johnson, supra*, 26 Cal.3d at p. 576.) Even if the reviewing court believes that the evidence might also reasonably be reconciled with the innocence of the defendant, this view "does not warrant interference with the determination of the trier of fact." (*People v. Towler, supra*, 31 Cal.3d at p. 118.) Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact's verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

The statutory requirement of entry is satisfied by "[a]ny kind of entry, complete or partial, direct or indirect Thus, the defendant's arm, foot, or finger placed in an open door, window, or other aperture, or through the glass of a window, is an entry." (2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 120, p. 151.)

The window shade to the dining room window had been pushed back against the curtain. It was not in this condition when Dougherty had checked the windows shortly before the incident. The trier of fact reasonably could conclude that Michael had disturbed the window shade by reaching inside to open the window wider. Thus, there was sufficient evidence that Michael had entered the residence. We reject as pure speculation Michael's argument that one of Dougherty's cats, or a police officer, or the wind caused the window shade and curtain to move. There was no need for the prosecution to present expert testimony, as Michael suggests, to rule out possible causes for the movement of the window shade other than Michael's hand.

Moreover, even without the movement of the window shade, there is substantial evidence of an entry under *People v. Nible* (1988) 200 Cal.App.3d 838, 846, which held penetration of a window screen constitutes entry under the burglary statute. It was undisputed that Michael removed window screens and opened windows.

In *People v. Nible, supra*, 200 Cal.App.3d at page 842, a woman asleep in her apartment heard a noise, investigated and caught a burglar in the act of removing a screen of an open window. She closed the window and called her husband, who summoned the

police. The defendant had not penetrated "the plane formed by the window beyond." (*Id.* at p. 843.)

The *Nible* court asserted the fact that the "'air space' " of the structure had not been violated is not necessarily determinative of whether there was an entry for purposes of the burglary statute. (*People v. Nible, supra*, 200 Cal.App.3d at p. 844.) "As the burglary statute is designed to protect against unauthorized entry and its attendant dangers, the ultimate test of whether a burglarious entry has occurred must focus on the protection the owners or inhabitants of a structure reasonably expect." (*Ibid.*) Using this "reasonable expectation" standard, the Court of Appeal held that "when a screen which forms the outer barrier of a protected structure is penetrated, an entry has been made for purposes of the burglary statute." (*Id.* at p. 845.) As the *Nible* court explained:

" 'The opening of a screen door or window is deemed a burglarious breaking, . . . In such cases the screen door [or window] is not to be considered as a mere protection against flies, but rather as a permanent part of the dwelling. The holdings proceed, it would seem, on the grounds that the screen door [or window] is a part of the house on which the occupants rely for protection and that to open such a door [or window] is a violation of the security of the dwelling house which is the peculiar gravamen of a burglarious breaking.' [Citation.]" (*Ibid.*)

The *Nible* analysis is particularly appropriate to this case because Dougherty had nailed her screens to the house, evidencing she considered the screens to be the outer boundary of her house and to provide some protection against unauthorized intrusions.

Michael argues unpersuasively that we should reject the *Nible* court's "reasonable expectation" approach. We decline to do so.

Furthermore, regardless of whether an "air space" or "reasonable expectation" approach is used, the removal of the window screens constituted substantial evidence of an entry by Michael. As the *Nible* court pointed out, "it is reasonable to conclude that a window screen contains the outer boundary of a building's air space. . . ." (*People v. Nible, supra*, 200 Cal.App.3d at p. 844.) "It can be argued with equal force that the threshold of a building is formed at its window screens as it can that the threshold is formed at the building's windows. Both the window and the window screen form boundaries separating the interior of the dwelling from the great outdoors." (*Id.* at p. 844, fn. 3.)

In sum, there was sufficient evidence of an entry by Michael and the true finding of burglary is supported by substantial evidence.

DISPOSITION

The order is affirmed.

McCONNELL, J.

I CONCUR:

KREMER, P. J.

I CONCUR IN THE RESULT:

McDONALD, J.